

EXHIBIT C

BILL ANALYSIS

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Date of Hearing: April 21, 2015

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Mike Gatto, Chair

AB 929
(Chau) - As Amended April 15, 2015

SUBJECT: Pen registers: authorized use

SUMMARY: Authorizes state and local law enforcement agencies to seek an emergency order to use pen registers and trap and trace devices in telephone surveillance if there is probable cause to believe that their use will lead to evidence of a crime. Specifically, this bill:

- 1) Prohibits a person from installing or using a pen register or a trap and trace device without first obtaining a court order, as specified.
- 2) Authorizes a provider of electronic or wire communication service to use a pen register or a trap and trace device for any of the following purposes:
 - a) To operate, maintain, and test a wire or electronic communication service;
 - b) To protect the rights or property of the provider;
 - c) To protect users of the service from abuse of service or unlawful use of service;

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- d) To record the fact that a wire or electronic communication was initiated or completed to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful, or abusive use of service; or,
 - e) If the consent of the user of that service has been obtained.
- 1) Provides that a violation of these provisions is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment, or by both that fine and imprisonment.
- 2) Declares that a good faith reliance on an order issued or an authorization made pursuant to these provisions is a complete defense to a civil or criminal action.
- 3) Authorizes a peace officer to apply to a magistrate for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device.

4) Requires the application to be in writing under oath or its equivalent, include the identity of the peace officer making the application and the identity of the law enforcement agency conducting the investigation.

5) Requires the applicant to certify that the information likely

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to be obtained is relevant to an ongoing criminal investigation and shall include a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

6) Requires the magistrate to enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device if the magistrate finds that the information likely to be obtained by the installation and use of a pen register or a trap and trace device is relevant to an ongoing criminal investigation, and finds that there is probable cause to believe that the pen register or trap and trace device will lead to obtaining evidence of a crime, contraband, fruits of crime, things criminally possessed, weapons, or other things by means of which a crime has been committed or reasonably appears about to be committed, or will lead to learning the location of a person who is unlawfully restrained or reasonably believed to be a witness in a criminal investigation or for whose arrest there is probable cause.

7) Requires the magistrate to enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device if the magistrate finds that the information likely to be obtained by the installation and use of a pen register or a trap and trace device is relevant to an ongoing criminal investigation, and finds that there is probable cause to believe that the pen register or trap and trace device will lead to:

- a) Stolen or embezzled property;
- b) Property or things used as the means of committing a felony;

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- c) Property or things in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered;

- d) Evidence that tends to show a felony has been committed, or tends to show that a particular person has committed or is committing a felony;

- e) Evidence that tends to show that sexual exploitation of a child, or possession of matter depicting sexual conduct of a person under 18 years of age, has occurred or is occurring;
- f) The location of a person who is unlawfully restrained or reasonably believed to be a witness in a criminal investigation or for whose arrest there is probable cause;
- g) Evidence that tends to show a violation of specified worker's compensation and insurance provisions; or
- h) Evidence that tends to show violations of the Fish and Game Code or the Public Resources Code.

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- 8) Authorizes the magistrate to seal portions of the application upon the request of the person seeking the pen register or trap and trace device, as specified.
- 9) Provides that information acquired solely pursuant to the authority for a pen register or trap and trace device shall not include any information that may disclose the physical location of the subscriber, except to the extent that the location may be determined from the telephone number.
- 10) Requires that an ex parte order authorizing the installation and use of a pen register or a trap and trace device to specify the following:
 - a) The identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached;
 - b) The identity, if known, of the person who is the subject of the criminal investigation;
 - c) The number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order;
 - d) A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates; and
 - e) The order shall direct, if the applicant has requested, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device.

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11)An order authorizing the installation and use of a pen register or a trap and trace device may not exceed a period of 60 days, which may be extended by a period of no more than 60 days if there is continued probable cause that the information or items sought are likely to be obtained under the extension.

12)Requires an authorization order or extension to direct that the order be sealed until otherwise ordered by the magistrate or a judge of the superior court, and that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the register, device or investigation. _

13)Requires a communication service provider, landlord, custodian, or other person to immediately provide the peace officer all information, facilities, and technical assistance necessary to install the pen register or trap and trace device, as specified, and to provide results to the peace officer at reasonable intervals during regular business hours for the duration of the order.

14)Authorizes the magistrate to examine on oath the person seeking the pen register or trap and trace device and any witnesses the person may produce, and may take his or her affidavit or their affidavits in writing.

15)Authorizes a magistrate, upon oral application by a peace officer, to grant oral approval for the installation and use of a pen register or a trap and trace device, without an order, if he or she determines all of the following:

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a) There are grounds upon which a 60-day order could be issued:

b) There is probable cause to believe that an emergency situation exists with respect to the investigation of a crime; and

c) There is probable cause to believe that a substantial danger to life or limb exists.

16)Requires the peace officer who made the oral application to submit a written application for an order to the original magistrate by midnight of the second full court day after the pen register or trap and trace device is installed. If such an order is issued, the order shall cite the time of the oral approval and shall be retroactive to the time of the original oral approval.

17)Requires that, in the absence of an authorizing order, the use under the oral approval shall immediately terminate when the information sought is obtained, when the application for the order is denied, or by midnight of the second full court day after the pen register or trap and trace device is installed, whichever is earlier.

18)Requires a communication service provider, landlord, custodian, or other person who provides facilities or technical assistance pursuant to this section to be reasonably compensated by the requesting peace officer's law enforcement agency for the reasonable expenses incurred in providing the facilities and assistance.

19)Defines the terms "wire communication," "electric

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communication," "pen register," and "trap and trace device."

20)Provides that no reimbursement is required because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, or changes the definition of a crime.

EXISTING LAW:

- 1)Authorizes the Attorney General or a district attorney to make a written application to a judge of a superior court for an order permitting the interception of wire communication and electronic communication, as defined. (Penal Code (PC) Section 629.50)
- 2)Permits an application to be made informally and granted orally if an emergency situation exists, and other factors are present. (PC 629.56)
- 3)Conditions the granting of an oral approval on the filing of a written application by midnight of the second full court day after the oral approval is made. (PC 629.56(b))
- 4)Prohibits a communication interception from lasting for longer than 30 days. (PC 629.58)

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- 5)Permits an extension of the original order, not to exceed 30 days, upon a showing that there is continued probable cause that the information sought is likely to be obtained under the extension. (PC 629.58)

FISCAL EFFECT: Unknown

COMMENTS:

1)Purpose of this bill. This bill is intended to authorize state and local law enforcement to seek emergency orders for pen registers/trap and trace devices used in telephone surveillance, while requiring as a precondition a standard of evidence higher than under federal law. This bill is co-sponsored by the Los Angeles County District Attorney's Office and the Los Angeles County Sheriff's Department.

2)Author's statement. According to the author, "Federal law allows law enforcement agencies to use pen register and trap and trace devices, but they must obtain a court order from a judge prior to the installation of the device. However, during an emergency situation, they may use these devices without a court order if they obtain the court order within 48 hours of the use of the device. Law enforcement agencies must

demonstrate that there is reasonable suspicion that the use of the device is relevant to an ongoing criminal investigation and will lead to obtaining evidence of a crime for a judge to authorize the use.

"Though federal law authorizes states and local law enforcement officers to use pen register and trap and trace devices by obtaining a court order first, it does not allow them to obtain an emergency order unless there is a state statute authorizing and creating a process for states and local

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law enforcement officers to do so.

"AB 929 will provide law enforcement officers with a critical tool in protecting public safety during ongoing criminal investigations and emergency situations by authorizing the use of a pen register or a trap and trace device based on a finding of probable cause."

3)Pen registers/trap and trace devices . As noted above, pen registers/trap and trace devices are used by law enforcement for telephone surveillance to record incoming and outgoing phone numbers from a tapped line. Historically, "pen registers" are used to record outgoing numbers from a particular telephone line, while "trap and trace" devices allow them to record the numbers that call in. The two terms are often used together, because the two technologies are almost always requested together. For purposes of simplicity, they will be jointly referred to here as a "pen/trap" device.

According to the author, "these technologies are extremely useful for law enforcement in situations such as gang and narcotic investigations. Federal law allows law enforcement agencies to use pen register and trap and trace devices, but they must obtain a court order from a judge prior to the installation of the device [which cannot exceed 60 days in duration]. However, during an emergency situation, they may use these devices without a court order if they obtain the court order within 48 hours of the use of the device. Law enforcement agencies must demonstrate that there is reasonable suspicion that the use of the device is relevant to an ongoing criminal investigation and will lead to obtaining evidence of a crime for a judge to authorize the use." A pen/trap order is

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only for the capture of incoming and outgoing phone numbers, and not to record audio or text messages, or to obtain real-time geophysical data on a cellphone.

However, there is a legal complication with the use of emergency orders. The Los Angeles District Attorney's Office writes, "[t]hough federal law authorizes states and local law enforcement officers to use pen register and trap and trace devices by obtaining a court order first, it does not allow them to obtain an emergency order unless there is a state statute authorizing and creating a process for states and local law enforcement officers to do so." California does not have such an authorizing statute, although six other states do: Alabama, Florida, Georgia, Iowa, Texas and Washington.

As a result of the lack of an authorizing statute, the Los Angeles District Attorney's Office suggests that some law enforcement agencies have utilized warrantless emergency declarations without proper authorization, which is technically a federal misdemeanor.

In response, AB 929 would explicitly authorize state and local law enforcement officers to use pen register and trap and trace devices, including during emergency situations.

4)Standards of evidence . As noted above, pen/trap orders sought on the basis of federal law, such as those sought by federal law enforcement in federal courts, require the requesting agency to prove "reasonable suspicion," a standard lower than probable cause (described below), but more than an 'inchoate and unparticularized suspicion or hunch', based on specific and articulable facts, taken together with rational inferences from those facts, and associated with a specific individual. It is often applied as the standard of evidence sufficient for a police officer to stop and frisk an individual. (see Terry v. Ohio, 392 U.S. 1, 1968)

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By comparison, Ballantine's Law Dictionary defines "probable cause" as "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true." Probable cause is considered a higher standard of evidence than reasonable suspicion, and is generally used as the basis for arrests or search warrants.

Notably, there is some variation in the standards of evidence used for pen/trap orders here in California. According to the Los Angeles District Attorney's Office, the California Attorney General's office has issued a legal opinion that state law enforcement officers should be required to meet the higher probable cause standard when seeking a pen/trap order from a state court judge since 2003 due to the right of privacy provisions in the California Constitution. Los Angeles County, and some other counties as well, have decided to apply the higher standard to their own requests for pen/trap orders, but not all counties have followed suit, in large part because the Attorney General's opinion is advisory only.

This bill would explicitly require the higher probable cause standard for all pen/trap orders obtained by a state or local law enforcement agency from a California magistrate.

5)Arguments in support . According to the Los Angeles County District Attorney's Office, "[AB 929] would authorize state and local law enforcement officers to use pen register and trap and trace devices under state law. AB 929 would also authorize the issuance of emergency pen registers and trap and trace devices. Under the provisions of AB 929 a California court could issue a court order authorizing the use of a pen register and/or a trap and trace device upon a showing of

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probable cause which is a higher standard than the reasonable suspicion standard required under federal law...AB 929 would create a comprehensive pen register/trap and trace device statute in the Penal Code to cover all requests for pen registers and trap and trace devices in California, including emergency open registers."

6)Question for the Committee . The key privacy question posed by this bill is how the authorization of pen registers and trap and trace devices under a probable cause standard of evidence would impact individual privacy.

As noted above, the federal standard of evidence for getting a pen/trap order is reasonable suspicion - and will remain that way. Federal agents going to federal court in California will still be able to get pen/trap orders under the reasonable suspicion standard provided by federal law. And by default, state agencies working joint state/federal investigations seeking a similar order from a federal magistrate under the federal statute would abide by the same standard.

However, some agencies, such as the Los Angeles District Attorney's Office, have opted to impose a higher standard - probable cause - on their own pen/trap orders, voluntarily. As a result, some law enforce agencies in other counties currently abide by the lower federal standard when seeking a pen/trap order, while others voluntarily follow the higher standard.

This bill would impose the higher standard of probable cause on all state and local law enforcement agencies and thereby require some of those agencies to raise the standard they are currently using. To the extent that a higher evidentiary standard means that law enforcement must show more evidence of a potential crime before they can lawfully utilize invasive

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surveillance technology like a pen/trap, individual privacy would arguably be better protected by this bill.

7)Double-referral . This bill was double-referred to the Assembly Public Safety Committee, where it was heard on April 7, 2015, and passed on a 6-0 vote.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (co-sponsor)

Los Angeles County Sheriff's Department (co-sponsor)

Association for Los Angeles Deputy Sheriffs

California District Attorneys Association

California Fraternal Order of Police

California State Sheriffs' Association

California Statewide Law Enforcement Association

Long Beach Police Officers Association

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Los Angeles County Professional Peace Officers Association

Los Angeles Police Protective League

Riverside Sheriffs Association

Sacramento County Deputy Sheriffs' Association

Santa Ana Police Officers Association

Opposition

None received.

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